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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-444

PETER C. ANDRESEN,

Petitioner,

vs.

BAR ASSOCIATION OF
MONTGOMERY COUNTY, MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Maryland

PETER C. ANDRESEN
Counsel for Petitioner
3514 Plyers Mill Road
Kensington, Maryland 20795

PETER C. ANDRESEN
Counsel of Record
3514 Plyers Mill Road
Kensington, Maryland 20795

September, 1973

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Supreme Court of the United States

OCTOBER TERM, 1973

No.

PETER C. ANDRESEN,

Petitioner,

vs.

BAR ASSOCIATION OF
MONTGOMERY COUNTY, MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Maryland

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Peter C. Andresen, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on June 12, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is unreported and is printed in the Appendix hereto, *infra*, page A-12. The docket entry of judgment of the Circuit Court for Montgomery County, Maryland, is printed in the Appendix hereto, *infra*, page A-12.

JURISDICTION

The judgment and order of the Court of Appeals of Maryland (Appendix, *infra*, page A-32) was entered on June 12, 1973. A timely Motion for Reargument and Modification of Opinion was denied on July 19, 1973 (Appendix, *infra*, page A-33). The jurisdiction of the Court is invoked under *28 U.S.C., Section 1257 (3).*

QUESTIONS PRESENTED FOR REVIEW

I. Will an audit of the subject accounts of Peter C. Andresen, petitioner herein, as ordered by the State Courts, violate his Constitutional rights as prescribed by the 4th and 5th Amendments to the Constitution of the United States?

II. Is the State statute, under which this action was originally instituted, repugnant, on its face and/or as applied, to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment IV –

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V –

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article 21, Section 42(c), Annotated Code of Maryland (1966 Replacement Volume, as amended) – (Appendix, *infra*, page A-38).

STATEMENT OF THE CASE

This was an action brought by the Bar Association of Montgomery County, Maryland, in the Circuit Court for said County and State, seeking a special audit of the accounts maintained by Peter C. Andresen, Esquire, for funds received in connection with real estate closing transactions in the state of Maryland. This action was brought pursuant to *Article 21, Section 42(c), Annotated Code of Maryland (1966 Replacement Volume, as amended)*, which statute purported to authorize such an audit.

In its verified petition for special audit (Appendix, *infra*, page A-1), the Bar Association alleged pending criminal

charges against Peter C. Andresen as part of the reason for desiring to make a special audit of his escrow accounts.

At trial, Peter C. Andresen set up his Constitutional rights as prescribed by the 4th and 5th Amendments to the Constitution of the United States, in opposition to the petition for special audit, with emphasis on the 5th Amendment rights. On December 19, 1972, after a trial before the court, an order was entered directing that the special audit be performed (Appendix, *infra*, page A-9).

On appeal, Peter C. Andresen more fully elaborated on the intertwining effect of the 4th and 5th Amendments and the reasons why in this case a violation of his Constitutional rights under either of these two amendments would also violate his rights under the other amendment. Nowhere in the record was it ever suggested or established that the voluntarily maintained personal accounts of Peter C. Andresen, sought to be audited in this case, were accounts required to be maintained pursuant to any regulatory scheme with enforcement procedures, as was the case in *Shapiro vs. United States*, 335 U.S. 1, 68 S. Ct. 1375, 92 L.Ed. 1787 (1948). Further, the record showed that no one had lost any money as a result of the settlements brought up at trial, and that the only possible use which could be made of such an audit would be in criminal or disciplinary proceedings.

The Court of Appeals of Maryland applied *Article 10, Section 44, Annotated Code of Maryland*, which statute was not brought up at the trial level, and *Maryland Rule 1230 (DR 9-102), Maryland Rules of Procedure* (Appendix, *infra*, page A-40), which became effective only after the settlements alleged in the petition for special audit had taken place, and which the Court of Appeals sought to

give retroactive effect. The Court of Appeals also misinterpreted and misapplied the case of *Spevak vs. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) to the facts of this case.

By opinion dated June 12, 1973 (Appendix, *infra*, page A-12), the Court of Appeals of Maryland affirmed the judgment of the trial court, with a few minor modifications.

On July 9, 1973, Peter C. Andresen filed with the Court of Appeals of Maryland a Motion for Reargument and Modification of Opinion and a Motion to Stay Issuance of Mandate Pending Review by the Supreme Court of the United States, both of which were denied on July 19, 1973 (Appendix, *infra*, p. A-33). An Application for Stay of Mandate was then filed in this Court and was denied by Mr. Justice Douglas on July 27, 1973 (Appendix, *infra*, page A-36), and by Mr. Justice Powell on August 18, 1973 (Appendix, *infra*, page A-37).

REASONS FOR ALLOWING A WRIT OF CERTIORARI

A writ of certiorari should be allowed in this case because the decision of the Court of Appeals of Maryland below is in direct conflict with the decision of this Honorable Court in *Spevak vs. Klein*, 87 S.Ct. 625, 385 U.S. 511, 17 L.Ed.2d 574 (1967), which case was so similar in nature to the issues presented in the instant case that it appears to be on all fours with it.

In *Spevak (supra)*, this Honorable Court, in *87 S.Ct.*, at pages 629-630, reversed because the appellant had no opportunity at the trial to show that a disciplinary rule "should not be given a broad sweep and to record that the documents demanded by the subpoena had no 'public

aspects' within the required rule, but were private papers." The same is true in the instant case. Appellant, here also, was denied the identical opportunity at the trial level because the appellee did not raise, nor did it even hint, that the records sought were required to be kept by any rule or regulation. Instead, the Court of Appeals of Maryland relied almost entirely on a disciplinary rule, possibly broader in nature than the one in *Spevak (supra)*, which had never been raised below. Furthermore, the said rule was not even adopted at the time of the factual situation raised below. The Court of Appeals of Maryland in applying this rule then decided this case below relying chiefly upon *Shapiro vs. United States, (supra)*, which case is clearly distinguishable from the instant case.

In *Shapiro (supra)*, as in all other authorities relied upon by the Court below, the records sought were required to be maintained by statute or regulation. Such is not the situation in the instant case. As a result, it appears that not only is the decision in direct conflict with a decision of this Honorable Court, but that there are ambiguities, or at least differing opinions as to the legal interpretation and effect of the *Spevak* and *Shapiro* cases (*supra*) when considered together. Thus a writ of certiorari should issue in order that the decision below be rectified, or at least that the ambiguities between *Spevak* and *Shapiro (supra)* as decided by this Court, and the interpretation thereof, may be resolved and the cases clarified.

In addition, this case is of primary importance and presents fairly debatable issues regarding the constitutionality of the novel state statute in question here, or of a similar statute, which, to the best of the petitioner's knowledge, has never been tested in the Federal courts. The determination of these issues has a direct and important

bearing on all attorneys and the vast number of other persons, entities, etc., which conduct real estate settlements.

Another debatable issue of primary importance revolves around the constitutionality of the said state statute as applied in this case, in light of criminal proceedings against the petitioner herein and the Bar Association's admitted intentions to use the findings of the audit in some criminal or disciplinary proceedings.

Additionally, the petitioner's liberty and freedom are at stake in this case and the fundamental rights asserted by the petitioner, as guaranteed by the Constitution of the United States, are being assailed by the State courts' actions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER C. ANDRESEN
Counsel for Petitioner
3514 Plyers Mill Road
Kensington, Maryland 20795

PETER C. ANDRESEN
Counsel of Record
3514 Plyers Mill Road
Kensington, Maryland 20795

APPENDIX

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	)	
PETITION FOR SPECIAL AUDIT	)	
UNDER THE PROVISIONS OF	)	No. 44821
ARTICLE 21, SECTION 42 OF	)	Equity
THE ANNOTATED CODE OF MARYLAND	)	

- - - - - - - - - - - - -

[Filed November 6, 1972]

PETITION FOR SPECIAL AUDIT

Comes now the Bar Association of Montgomery County, Maryland, a body corporate, by its Attorney, James T. Wharton and respectfully represents unto this Honorable Court:

1. This Petition is brought by the Bar Association of Montgomery County, Maryland, a body corporate, which is charged with *inter alia*, certain duties under the Public General Laws of the State of Maryland and Maryland Rules of Procedure, with respect to the supervision and discipline of the members of the Bar practicing in Montgomery County.

2. That the said Petitioner is also empowered, pursuant to Article 21, Section 42(c) of the Annotated Code Of Maryland to petition this Court for a special audit, under certain circumstances specified by said Code provision, of the accounts maintained for funds received in connection with certain real estate transactions.

3. That Peter C. Andresen, Esquire, a member of the Bar of the Court of Appeals of Maryland and of the Montgomery County Bar, with offices at 3700 Decatur Avenue, Kensington, Maryland, has been charged by Bill of Information by the State's Attorney for Montgomery County in that proceeding presently pending before this Honorable Court and known as Criminal No. 13189.

4. In the body of the Bill of Information aforesaid, the said Peter C. Andresen, Esquire has been charged with certain alleged acts which, if true, may constitute criminal violations of the Public General or Common Law of Maryland, all as alleged therein in said Bill of Information, attached hereto and prayed to be incorporated herein by reference and made a part hereof as Exhibit A.

5. That in addition thereto, there appear to be other and additional facts made available to this Association by the State's Attorney for Montgomery County which strongly suggest circumstances warrranting the granting of a special audit upon the escrow fund accounts of the said Peter C. Andresen, Esquire, at the earliest possible time.

6. That this Association is advised and informed by the said State's Attorney for Montgomery County and therefore verily believes that in the following situations, all purchases from Clark King Construction Company to the indicated homeowners, all located in Potomac Woods Subdivision, releases of deeds of trust appear to have been made tardily or not at all, and therefore require the scrutiny of this Court and the most complete investigation thereby in order to assure both compliance with the provisions of Article 21, Section 42 of the Annotated Code of Maryland and other applicable provisions of Maryland law and protection of the public in such and other related matters.

The matters revealed in the above-indicated situations are all settlement matters handled by Peter C. Andresen:

Lot 12T

4/12/72	Deed from Clark-King to Mr. and Mrs. Paul Doherty recorded at 4202-407
8/17/72	Deed of Trust from Clark-King securing James A. Federline recorded at 4258-281
Unreleased	Above Deed of Trust.
Unreleased	Clark-King's Deed of Trust securing Arthur Dale Lumsden and assigned to Madison National Bank.
10/4/72	Clark-King's Deed of Trust securing Anderson and Brandt, released at 4282-149
10/4/72	Clark-King's Deed of Trust securing Pinehurst Investment, Inc released at 4169-489

Lot 13T

11/28/69	Deed from Clark-King to Raffaele Antonelli and Rocco Caniglia at 3922-344. (Peter Andresen handled settlement)
7/19/72	Deed from Antonelli and Caniglia to Young Contracting Company, Inc. (Peter Andresen handled setltlement)
10/3/72	Clark-King's Deed of Trust securing State National Bank released at 4281-589
Unreleased	Clark-King's Deed of Trust securing Arthur Dale Lumsden, assigned to Madison National Bank

Lot 14(S)

9/7/71	Deed from Clark-King to Dr. and Mrs. David M. Livingston recorded at 4118-251
7/10/72	Deed of Trust from Clark-King securing F.O. Day released at 4238-657

Lot 15(S)

12/1/71	Deed from Clark-King to Mr. and Mrs. Francis Williams recorded at 4154-861
Unreleased	Deed of Trust from Clark-King securing Arthur Dale Lumsden and assigned to Madison National Bank
7/10/72	Deed of Trust from Clark-King securing F. O. Day released at 4238-657
10/4/72	Deed of Trust from Clark-King securing PEPCO released at 4068-602

Lot 25(R)

7/17/70	Deed from Mr. and Mrs. Warfield recorded at 3981-286
7/11/72	Deed of Trust from Clark-King securing F. O. Day released at 4239-547

7. That the investigation already made by the said State's Attorney for Montgomery County further indicates that many of those purchasers adverted to hereinabove knew nothing of the named unreleased mortgages until the subject was revealed by him to them.

8. That, based upon this information, great concern must be expressed by this Association as to these developments, all of which motivate it to call for the relief herein prayed.

WHEREFORE, the premises considered, your Petitioner respectfully prays:

1. That this Honorable Court enter its Order pursuant to Article 21, Section 42 of the Annotated Code of Maryland for the said Peter C. Andresen, Esquire, to show cause; if any he has, within ten (10) days from the service thereof, why an independent audit ought not to be conducted of the accounts he maintains for funds received in connection with real estate closing transactions in the State of Maryland.

2. That upon consideration thereof, this Honorable Court enter its Order requiring an Ex Parte audit.

3. That an Ex Parte Order be entered enjoining the said Peter C. Andresen, Esquire, from secreting or taking any of his escrow accounts, books, records or statements of accounts from Montgomery county, Maryland during the pendency of these proceedings.

4. That this Cause be sealed as required during the pendency of these proceedings.

5. For such other and further relief which to this Court may seem proper and which this Cause may require.

/s/ James Robert Miller
JAMES ROBERT MILLER
President, Bar Association of
Montgomery County, Maryland

(SEAL)

/s/ James T. Wharton
JAMES T. WHARTON, Attorney
for Petitioner
100 S. Washington St.
Rockville, Maryland 762-7770

STATE OF MARYLAND:
to wit:
COUNTY OF MONTGOMERY:

I HEREBY CERTIFY, that on this 6th day of November, 1972, before me, the subscriber, a Notary Public in and for the State and County aforesaid, personally appeared JAMES ROBERT MILLER, President, Bar Association of Montgomery County, Maryland, who made oath in due form of law, that matters and facts contained herein are true and correct to the best of his knowledge and belief.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal.

/s/ Capitola E. Collier
Notary Public

(SEAL)
My Commission Expires: 7/1/74

Exhibit A – 44821

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND
VS
PETER C. ANDRESEN, *Defendant*

CRIMINAL NO. 13189

[Filed]

BILL OF INFORMATION

FIRST COUNT – FALSE PRETENSES

Andrew L. Sonner, State's Attorney for Montgomery County, Maryland, duly authorized and empowered to

investigate and prosecute the above-entitled offense, upon his official oath informs this Court that PETER C. ANDRESEN, on or about the eighteenth day of July, 1972, in Montgomery County, unlawfully and knowingly, by a certain false pretense, did obtain from Young Contracting Company, Inc., a corporation, and Standard Investment Corporation, a corporation, trading as joint venturers under the name of Standard-Young Associates, twelve thousand dollars ($12,000.00) current money, of the goods, chattels, moneys and property of Standard-Young Associates, with intent then and there to defraud, in violation of Article 27, Section 140, of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

SECOND COUNT – FALSE PRETENSES

Andrew L. Sonner, State's Attorney for Montgomery County, Maryland, duly authorized and empowered to investigate and prosecute the above-entitled offense, upon his official oath informs this Court that PETER C. ANDRESEN, on or about the thirteenth day of September, 1972, in Montgomery County, unlawfully and knowingly, by a certain false pretense, did obtain from the Title Insurance Company of Minnesota, a corporation, twelve thousand dollars ($12,000.00) current money, of the goods, chattels, moneys and property of the Title Insurance Company of Minnesota, in violation of Article 27, Section 140 of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

THIRD COUNT – FALSE PRETENSES

Andrew L. Sonner, State's Attorney for Montgomery County, Maryland, duly authorized and empowered to investigate and prosecute the above-entitled offense, upon his official oath informs this Court that PETER C. ANDRESEN, on or about the eighteenth day of July, 1972, in Montgomery County, unlawfully and knowingly, by a certain false pretense, did obtain from Standard Savings and Loan Association of Gaithersburg, a corporation, fifty-two thousand dollars ($52,000.00) current money, of the goods, chattels, moneys and property of Standard Savings and Loan Association of Gaithersburg, in violation of Article 27, Section 140, of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

FOURTH COUNT – FALSE PRETENSES

Andrew L. Sonner, State's Attorney for Montgomery County, Maryland, duly authorized and empowered to investigate and prosecute the above-entitled offense, upon his official oath informs this Court that PETER C. ANDRESEN, on or about the eighteenth day of July, 1972, in Montgomery County, unlawfully and knowingly, by a certain false pretense, did obtain from the Title Insurance Company of Minnesota, a corporation, fifty-two thousand dollars ($52,000.00) current money, of the goods, chattels, moneys and property of the Title Insurance Company of Minnesota, in violation of Article 27, Section 140, of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

/s/ Andrew L. Sonner
ANDREW L. SONNER
STATE'S ATTORNEY FOR MONTGOMERY COUNTY, MARYLAND

[Dated December 19, 1972]

* * * * *

ORDER

Upon consideration of the verified Petition filed herein and the testimony heard thereon, it is by the Circuit Court for Montgomery County, Maryland, this 19th day of December, 1972

ORDERED, that an audit be made of the accounts maintained by Peter C. Andresen, Esquire, for funds received in connection with real estate closing transactions in the State of Maryland; and it is further

ORDERED, that A. W. Thompson be, and he is hereby, appointed Special Auditor to conduct the aforesaid audit; and it is further

ORDERED, that the said Special Auditor is directed to submit his audit to the undersigned judge, who, upon receipt of the said audit, will notify counsel for the petitioner and respondent; thereafter, the Court will pass a further order in these proceedings, particularly with reference to the use of the said audit; and it is further

ORDERED, that the said Peter C. Andresen, Esquire, be and he is hereby enjoined and restrained from secreting or taking from Montgomery County, Maryland, any of the escrow or other accounts he maintains for funds received in connection with real estate closing transactions in the State of Maryland and/or any of his account books, check books, ledgers, statements of account, checks, stubs or files employed in connection therewith, until further ORDER of Court.

/s/ Ralph G. Shure,
Ralph G. Shure, Judge
Circuit Court for Montgomery
County, Maryland

DOCKET ENTRIES

* * * * *

BAR ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND,

Petitioner

FOR SPECIAL AUDIT

November	6, 1972	#1	Petition – One (1) Exhibit filed.
November	8, 1972	#2	Order to Show Cause filed. Subpoena issued for Peter C. Andresen returnable 1st. Monday December 1972. Copy of Petition and Order to be served on Peter C. Andresen on or before Dec. 1, 1972.
November	8, 1972	#3	Ex Parte Injunction filed. Copy of Ex Parte Injunction to be served on Peter C. Andresen forthwith!
November	8, 1972	#4	Order of Court directing Clerk to maintain pleadings under seal filed.
November	8, 1972	#5	Sheriff's Return – served 11-8-72 filed.
November	15, 1972	#6	Motion of Bar Association of Montgomery County, Maryland for extension of Ex Parte Injunction, Points and Authorities filed.
November	15, 1972	#7	Order of Court extending Ex Parte Injunction filed. Copy of Motion and Order to be served on Peter C. Andresen!
November	16, 1972	#8	Sheriff's return – served 11-15-72 filed.

November	24, 1972	#9	Motion – Points & Authorities & Order extending Ex Parte Injunction filed.
November	24, 1972		Copy of Motion & Order (Injunction) to be served upon Peter C. Andresen, Esq. forthwith.
December	11, 1972	#10	Order of Court extending Injunction filed. (Service by Solicitor)
December	14, 1972		Summons issued for Peter Hitchen, (d.t.); Mr. Seth L. Warfield, (d.t.); Mrs. Seth L. Warfield, (d.t.); Mr. Robert E. Holtzclaw, (d.t.) and Mrs. Robert E. Holtzclaw, (d.t.) returnable 12-18-72 at 10:00 A.M.
December	15, 1972	#11	Answer of Peter C. Andresen to Petition for Special Audit filed.
December	18, 1972		Hearing on Petition for Special Audit, (Shure, J.) Miss Wissenbach reporting.
December	18, 1972		Court (Shure, J.) orders audit to be made and report given to court who will notify counsel. Order to be prepared and signed.
December	18, 1972		Petitioner's exhibits #1 thru #3 admitted and filed. Respondent's exhibit #1 admitted and filed. Exhibit sheet filed.
December	18, 1972	#12	Sheriff's Return Served as to Peter C. Andresen 12-5-72 filed.
December	18, 1972	#13	Sheriff's Return Served as to Mr. S.L.W. & Mrs. S.L.W., Mr. R.E.H. & Mrs. R.E.H. 12-15-72 filed.
December	18, 1972	#14	Sheriff's return Non Est as to Peter Hitchen filed.

December	19, 1972	#15	Order of Court that audit be made of accounts maintained by Peter C. Andresen, Esq.; appointing A. W. Thompson as Special Auditor, and enjoining Peter C. Andresen, filed. (Copy mailed to Sols.)
January	17, 1973	#16	Appeal of Peter C. Andresen to Court of Appeals.
February	13, 1973	#17	Proceedings taken before Judge Ralph G. Shure December 18, 1972, filed

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IN THE COURT OF APPEALS
OF MARYLAND

No. 336
September Term, 1972

PETER C. ANDRESEN

v.

BAR ASSOCIATION OF
MONTGOMERY COUNTY, MARYLAND

Murphy, C. J. Barnes
McWilliams Singley
Smith Digges
Levine,

JJ.

Opinion by Murphy, C.J.

[Filed June 12, 1973]

Maryland Code (1957, 1966 Repl. Vol., 1971 Cum. Supp.) Article 21, §42 (recodified as Article 21, §7-106 in the 1973

Repl. Vol.), authorizes any duly organized bar association of this State to petition a court of equity "to order an audit to be made of the accounts maintained . . . for funds received in connection with real estate closing transactions in this State" by persons responsible for disbursing funds in connection with the conveyancing of title to real estate where such persons fail to provide the buyer and seller, under certain circumstances and within a designated time, with specified documents evidencing the existence of recorded releases of mortgages or deeds of trust.[1]

---

[1] §42 (Chapter 726 of the Acts of 1968) provides:

"(a) *Duty of person responsible for disbursement of funds in real estate conveyance.* – When a person has undertaken responsibility for the disbursement of funds in connection with the conveyance of title to real property, it shall be the duty of such person to furnish to the seller and buyer in the transaction, the original or a photographic, photostatic or similarly reproduced copy of the recorded release of any mortgage or deed of trust which such person was obliged to obtain and record with all or part of the funds to be disbursed or, if such original or copy of a recorded release is not readily obtainable at the time of recording, it shall be sufficient to furnish the buyer or seller the original or a copy of the court's recordation receipt for such release or other certified court document clearly evidencing the recordation of such release.

"(b) *Time of delivery of evidence.* – The required evidence of a recorded release shall be mailed or otherwise delivered to the seller and buyer within thirty days from the delivery of the deed or deeds conveying title to the real property, except that if the recording of the release will be delayed beyond the thirty-day period for causes not attributable to the neglect, omission or malfeasance of the person responsible for the disbursement of funds, a letter explaining the delay shall be mailed or otherwise delivered to the seller and buyer within the third-day period, and such person shall furnish to the seller and buyer the required evidence of the recorded release at the earliest opportunity thereafter, provided that the person

(continued)

On November 6, 1972 the Bar Association of Montgomery County, pursuant to the provisions of §42, filed a petition in the Circuit Court for Montgomery County to obtain an audit of the accounts maintained by Peter C. Andresen, a member of the Maryland Bar, "for funds received in connection with real estate closing transactions in the State of Maryland." The petition alleged that the State's

---

[1] (continued)
shall follow the procedure of mailing or otherwise delivering a letter of explanation each thirty days until the required evidence of a recorded release is furnished to the buyer and seller.

"(c) *Noncompliance with subsections (a) and (b).* – If the provisions of subsections (a) and (b) are not complied with by the person responsible for the disbursement of funds, the seller, buyer or a duly organized bar association of this State, may petition a court of equity to order an audit to be made of the accounts maintained by such person for funds received in connection with real estate closing transactions in this State. The petition shall state concisely the facts showing such noncompliance and shall be verified. The court shall upon receipt of such petition issue an order to the person to show cause within ten days why such audit should not be conducted. If such cause is not shown, the court may order the audit to be conducted. The court may order such other relief as it deems appropriate under the circumstances of the case.

"(d) *Seller and buyer to be informed of provisions of section.* – Prior to the execution of the deed or deeds conveying title to the real property, the person responsible for the disbursement of funds shall inform the seller and buyer in writing of the provisions of this section.

"(e) *Effect of proper disbursement of funds within five days.* – Unless specifically requested to do so by either the buyer or the seller, a person responsible for the disbursement of funds in a real estate closing transaction shall not be required to provide such buyer or seller with the required evidence of a recorded release if such person properly disburses all funds entrusted to him in the course of the closing transaction within five (5) days from the date of the delivery of the deed or deeds conveying title to the real property.

* * * *

Attorney of Montgomery County had charged Andresen on November 1, 1972, by a criminal information, with four counts of false pretenses (as shown by a copy of the information attached to the petition); that "additional facts" had been made available to the Bar Association by the State's Attorney "which strongly suggest circumstances warranting the granting of a special audit upon . . . [Andresen's] escrow fund accounts"; that the Bar Association had been informed by the States Attorney that releases of deeds of trust "appear to have been made tardily or not at all" by Andresen who acted as settlement attorney for the sale of properties from the Clark-King Construction Company (Clark-King) to enumerated homeowners in the Potomac Woods Subdivision (the Subdivision) of Montgomery County; that the transactions in question involving unreleased deeds of trust pertained to lots 12(T), 13(T), 14(S), 15(S) and 25(R) of the Subdivision; and that the State's Attorney's investigation disclosed that many of the purchasers of properties in the Subdivision "knew nothing of the named unreleased mortgages until the subject was revealed . . . to them [by the State's Attorney]."

Responding to the court's order to show cause why the audit should not be conducted, Andresen answered that he had not failed to comply with the requirements of §42 because all the funds coming into his possession in connection with the transactions either "were disbursed within five days after settlement, the parties waived receipt of the releases, or that the parties were notified pursuant to §42 (b)." In addition, Andresen entered a general denial that sufficient ground existed to conduct a special audit under §42.

At the hearing on the petition, the Bar Association adduced evidence showing that on December 13, 1969, the

F.O. Day Company (Day) took a deed of trust from Clark-King, developers of the Subdivision, as security for payment of a note; that the deed of trust, securing a $37,000 debt owed Day by Clark-King, covered sixteen or seventeen lots in the Subdivision and contained a clause authorizing the trustees, Andresen and William Wheeler (Day's attorney) to release each lot upon payment to the noteholder of $2,000 per lot; that no payments on account of the note were made until October 7, 1970 when $9,000 obtained by Clark-King in connection with settlement upon one of its properties located outside the Subdivision was paid to Day. There was evidence showing that settlement was held on a number of properties purchased within the Subdivision between 1970 and 1972; that Andresen acted as settlement attorney in these transactions; that the outstanding deed of trust held by Day covering the lots in the Subdivision was not disclosed by Andresen at the time of settlement and no release of many of the properties covered by the deed of trust was recorded until many months after the deeds were delivered. Testimony given by the purchasers of lots 25(R) and 7(T) in the Subdivision was to the effect that deeds for these properties were recorded in July of 1970, but they were not furnished copies of recorded releases of the deed of trust covering their lots until two years later in July and August of 1972 when the lots were released from the operation and effect of the deed of trust after demand was made upon Andresen that he provide each of them with a copy of the recorded release. In neither case were the property owners notified of any reason for the delay in releasing the deeds of trust.

Considerable evidence produced by the Bar Association to prove that Andresen, as settlement attorney, failed to comply with the requirements of §42 (a) and (b) pertained to properties in the Subdivision which were not specifically

alluded to in the petition. Andresen's objections to the introduction of such evidence were summarily overruled by the trial court.

There was evidence showing that at the time of settlement on lots 25(R) and 7(T), the property owners, after being advised by Andresen of the provisions of §42, signed the following written waiver:

> "We hereby waive being furnished evidence of recorded releases; having been assured by said settlement attorney that all funds in this transaction will have been disbursed within 5 days from the date of delivery of the deed."

Andresen did not testify at the hearing and offered no evidence on his own behalf.

The lower court found that the evidence disclosed "many transactions where there was a deed recorded, and a release was not of record until in some instances more than two years thereafter." The court concluded that "the presumption is . . . that the money was received but it was not disbursed." Believing that the waivers signed by the owners of lots 25(R) and 7(T) did not constitute compliance with the requirements of §42, and that the evidence otherwise showed that Andresen had not complied with the provisions of the statute, the court ordered that a special audit be conducted (by an independent auditor) "of the accounts maintained by . . . Andresen . . . for funds received in connection with real estate closing transactions in the State of Maryland." The order directed that the audit be submitted to the court and that upon receipt, the court would notify counsel for the parties and thereafter would pass "a further order in these proceedings, particularly with reference to the use of said audit." The

court's order enjoined Andresen from secreting or taking from Montgomery County any of the accounts to be audited, "or any of his account books, check book ledgers, statements of account, checks, stubs or files employed in connection therewith until further Order of this Court."

Andresen claims on appeal, as he did below, that his Fifth Amendment right against compulsory self-incrimination, applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), would be violated if he were compelled to submit his accounts to the special audit ordered by the court. He alleges that the information gleaned from the audit, if made, will be used in connection with the criminal proceedings pending against him instituted by the State's Attorney, and the disbarment or disciplinary proceedings previously initiated against him by the Bar Association. Other allegations raised by Andresen on appeal are (1) that the lower court erred in admitting into evidence and considering testimony and exhibits regarding matters not included or referred to in the pleadings; (2) that prejudicial error was committed by the court when it considered the testimony of the Bar Association's investigating attorney to be that of an expert in real estate transactions; (3) that the ocurt was in error in disregarding the written waivers executed by the property owners of their right under §42 to be furnished with evidence of recorded releases; (4) that the evidence was legally insufficient to support the court's order, particularly since no evidence was offered by the Bar Association to show that funds coming into Andresen's possession were not disbursed within five days from the date of delivery of the deeds, thus obviating the need to provide the buyer and seller with evidence of recorded releases; (5) that §42 was so vague and

indefinite as to constitute a violation of the due process clause of the Fourteenth Amendment; (6) that a compulsory production of Andresen's accounts would constitute an unreasonable seizure in violation of the Fourth Amendment to the federal constitution.

I

As heretofore indicated, §42(a) and (b) impose a duty upon attorneys assuming responsibility for disbursing funds in connection with the conveyance of title to real estate to provide the seller and buyer, within thirty days from the delivery of the deed (unless an extension of that period is warranted and becomes operative by reason of notice given to the parties), with documentary evidence of recorded releases of mortgages or deeds of trust. Under the provisions of §42(c) failure to comply with these requirements may result in a petition being filed by the seller, buyer, or a bar association seeking an audit of the attorney's "accounts maintained . . . for funds received in connection with real estate closing transactions in this State." Any such petition is required to "state concisely the facts showing such noncompliance and shall be verified." §42 (c). By the provisions of §42(e) a settlement attorney is not required to provide evidence of recorded releases to the seller and buyer if he "properly disburses all funds entrusted to him in the course of the closing transaction within five (5) days from the date of the delivery of the deed or deeds conveying title to the real property."

We think it readily evident that §42 was designed to protect the parties in transactions involving the conveyance of title to real estate from careless or fraudulent practices by persons having responsibility for disubrsing the funds

received in connection with the conveyance. The grant of authority to a duly organized bar association to petition the court for the audit permitted under §42(c) plainly reflects the Legislature's recognition that members of the Bar frequently assume the responsibility of disbursing funds in such transactions, and that it is in the general public interest, and in the special interest of the legal profession, that a bar association be authorized to assert noncompliance with the provisions of §42.

We are satisfied that the lower court could properly conclude, as it did, that an audit of Andresen's real estate accounts was essential because of the evidence showing his failure to comply with the positive requirements of §42(a) and (b).

The evidence adduced in connection with four of the five transactions specifically referred to in the Bar Association's petition showed that Andresen did not provide the requisite evidence manifesting release of the Day deed of trust within thirty days of the delivery of the deeds to the properties. That he did not properly disburse the settlement proceeds coming into his hands in connection with these transactions within five days from the delivery of the deeds in accordance with §42(e) is evidenced by the fact that Day's deed of trust was not released until months after the deeds had been delivered. But even if Andresen had disbursed within the five day period under §42(e), that fact alone would not necessarily insulate him from audit under §42(c); compliance with §42(e) grants relief only from the duty to provide evidence of recorded releases.

In the circumstances of this case, we do not think the admission of evidence involving transactions not mentioned in the Bar Association's petition constituted error prejudicial

to Andresen's defense; the evidence (except for one property) all relating to properties within the Subdivision — was essentially cumulative. Nor do we think that the waivers executed by the owners of lots 25(R) and 7(T) relieved Andresen of his obligation to provide them with evidence of the recorded releases; the waivers were plainly predicated upon disbursement being made by Andresen within five days from the date of delivery of the deeds, a condition not met.[2] And we find no error in the court's treatment of the alleged expert witness; his testimony was basically limited to reciting the details of his investigation into the land records of Montgomery County. The only opinion testimony given by him was elicited by Andresen on cross-examination, and it does not clearly appear that the lower court considered it as the testimony of an expert witness.

Since Andresen did not challenge the constitutionality of §42 in the lower court, on the ground that it was unconstitutionally vague and indefinite, nor there raise any question with respect to his Fourth Amendment right not to be subjected to illegal seizures, these constitutional issues have not been preserved for appellate review, and we do not pass upon them. *Schiller v. Lefkowitz*, 242 Md. 461, 219 A.2d 378 (1966); *Hewitt v. State*, 242 Md. 111, 218 A.2d 19 (1966); Maryland Rule 885.

II.

The key issue on appeal, and one which was preserved in the lower court, is the relationship of the constitutional

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[2] Whether, in view of the requirements of §42, a waiver of the right to receive recorded releases would be valid, if unconditional, is a question we do not reach in this appeal.

protection against compulsory self-incrimination to the ordered audit of Andresen's real estate accounts. Andresen claims protection under the Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment by *Malloy v. Hogan, supra*, and under Article 22 of the Maryland Declaration of Rights, which we have construed to be in *pari materia* with the Fifth Amendment, *Blum v. State*, 94 Md. 375, 51 A. 26 (1902), and subject to a like construction, *State v Panagoulis*, 253 Md. 699, 253 A.2d 877 (1969). It is well established that these constitutional provisions are available in civil as well as criminal proceedings, *United States v. Kordel*, 397 U.S. 1, 7-8, 90 S.Ct. 763, 767, 25 L.Ed.2d 1, 8 (1970) and cases cited therein at n. 10, to protect both oral testimony and private documentary evidence of a testimonial nature, *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), *Archer v. State*, 145 Md. 128, 125 A. 744 (1924), *Blum v. State, supra*, which present the claimant with substantial hazards of self-incrimination, *California v. Byers*, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971), *Malloy v. Hogan, supra, Midgett v. State*, 223 Md. 282, 164 A.2d 526 (1960).

Andresen relies on the Supreme Court's holding in *Boyd, supra*, a vintage case of continued vitality (*see Couch v. United States*, U.S. , 93 S.Ct. 611, 34 L.Ed.2d 548 (1973)); that case held that the private records and books of an individual are protected by the privilege against self-incrimination. The Bar Association claims that *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), and not *Boyd*, is the controlling authority; *Shapiro* held that records required to be kept by

law are "public records" outside the scope of the Fifth Amendment protection. Both parties cite *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967), which held that a lawyer could not be disbarred for refusal, on Fifth Amendment grounds, to produce his financial records subpoenaed to a judicial inquiry into professional misconduct. *Spevack* is not dispositive of the present controversy, however, for the Supreme Court there expressly refused to consider the applicability of *Shapiro* as the doctrine espoused in that case had not been timely raised below; nor has any subsequent case squarely answered the question.[3]

In *Shapiro* the court concluded that records and documents – sales invoices, sales books, ledgers, inventory records, contracts and sales records – required to be kept by valid regulations of the Office of Price Administration could be subpoenaed by the Price Administrator without violating Shapiro's right against self-incrimination. The Court reasoned, consistent with the principle announced in *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911), and followed in *Davis v. United States*, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946), and numerous state court decisions which it cited in n. 25, 335 U.S. at 18, 68 S.Ct. at 1385, 92 L.Ed. at 1799, that

> " '*records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of*

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[3] The commentators have generally taken the position urged by the Bar Association, *see, e.g.*, Niles and Kaye, "*Spevack v. Klein:* Milestone or Millstone in Bar Discipline?", 53 ABA Journal 1121 (1967).

> *governmental regulation and the enforcement of restrictions validly established . . .*'" 335 U.S. at 17, 68 S.Ct. at 1392, 92 L.Ed. at 1799 (emphasis in original.)

are analogous to public documents in public offices to which the privilege against self-incrimination does not attach. The Court distinguished *Boyd, supra,* as extending the protection only to private papers voluntarily maintained, 335 U.S. at 33, 68 S.Ct. at 1392, 92 L.Ed. at 1807-08 n. 42.

> ". . . there are limits which the government cannot constitutionaly exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. . . ." 335 U.S. at 32, 68 S.Ct. at 1391-92, 92 L.Ed. at 1807

the Court found the facts in *Shapiro* to be within those limits.

Subsequent cases have identified at least three essential elements of the required records doctrine: (1) the records required to be kept are of the same kind customarily kept by a person engaged in such activity; (2) the records have "public aspects" beyond the mere fact that the Government desires the information and has formalized its demand by statute, rule, or regulation; (3) the records relate to an essentially non-criminal and regulatory area of inquiry. *Marchetti v. United States,* 390 U.S. 39, 56-57, 88 S.Ct. 697, 707, 19 L.Ed.2d 889, 902-03 (1968), *Grosso v. United States,* 390 U.S. 62, 67-68, 88 S.Ct. 709, 713-714, 19 L.Ed.2d 906, 913 (1968).

The required records doctrine has been applied in numerous and various circumstances; we review only a few

illustrative cases. In *Hodgson v. Mahoney*, 460 F.2d 326 (1st Cir. 1972), the Secretary of Labor, in the process of seeking to enjoin violations of the Fair Labor Standards Act, obtained a court order directing the defendant-employer to either answer propounded interrogatories or permit the Secretary to examine his payroll records to obtain the information sought by the interrogatories. The Court approved the order, finding, " . . . the payroll records sought are required to be kept and preserved in order to effectuate governmental regulations . . . Consequently they have 'public aspects' and do not invoke the protection of the fifth amendment." 460 F.2d at 328. In *United States v. Warren*, 453 F.2d 738 (2d Cir. 1972), a doctor convicted of unlawful distribution fo drugs claimed violation of his right against self-incrimination in the seizure and admission into evidence of his records (index cards with patient names and notations of number of injections given, the dates and charges for them). The Court, finding no constitutional violation, distinguished the case from *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971), which relied upon the holding of *Boyd, supra*. The Court said:

> "*Hill v. Philpott* . . . held that business records seized by an Internal Revenue Agent could not be used without violation of the defendant's Fifth Amendment rights. In that case, however, the records were personal business items; in this case, Dr. Warren was required under 21 U.S.C. §360a(d) to make and keep records on acquisition and disposition of amphetamine. Such records, part of a regulatory scheme with public purposes, are not protected by the Fifth Amendment and are specifically excluded from the holding in *Hill*. 445 F.2d at 146. *United*

States v. Kaufman, 429 F.2d 240, 247 (2d Cir.), cert. denied, 400 U.S. 925, 91 S.Ct. 185, 27 L.Ed.2d 184 (1970); *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948)." 453 F.2d at 742.

In *Fairbank v. Hardin*, 429 F.2d 264 (9th Cir. 1970), the Secretary of Agriculture, through administrative proceedings, suspended the license of a registered livestock dealer for wilful misrepresentation of cattle weights in violation of federal law, proof of the violation being established, in part, by admission into evidence of an audit of the dealer's books and records. Rejecting the dealer's claim that his Fifth Amendment right against self-incrimination was thereby violated, the court held, 429 F.2d at 267:

> "Keeping in mind that petitioners' registration as a livestock dealer is a privilege granted by the Secretary of Agriculture, pursuant to the provisons of the Act, . . . and that a livestock dealer is required to keep records for examination by the officials of the agency, . . . and that the keeping of such records and their inspection, from time to time, are important and essential means in the accomplishment of the purposes of the Act, . . . the audit of petitioners' books and records by respondent Secretary was a proper procedure. Moreover, the receipt in evidence of the products of the audits and the testimony of the auditors in charge was proper and did not constitute error." [citations omitted.]

Similarly, the "non-privileged" nature of records required to be kept by ICC regulated carriers has been recognized

in the face of Fifth Amendment challenge in *United States v. Webb*, 398 F.2d 553, 556 (4th Cir. 1968). State courts have similarly recognized and applied the required records doctrine notwithstanding attack made on Fifth Amendment grounds. *See, e.g.: State Real Estate Commission v. Roberts*, 441 Pa. 159, 271 A.2d 246 (1970); *State v. Braun*, 209 Kan. 181, 495 P.2d 1000 (1972); *People v. Thayer*, 47 Cal. Rptr. 780, 408 P.2d 108 (1966); *Conner v. Alderman*, 159 So.2d 890 (Fla. 1964).

The required records doctrine of *Shapiro*, despite substantial criticism[4] has not been repudiated by the Supreme Court and continues to be controlling in appropriate factual situations.[5] Although the facts in the instant case do not present the classic prototype of the required records doctrine – *i.e.*, a pervasive regulatory scheme with enforcement procedures, including periodic reporting or inspection of records required to be kept thereunder – we think them close enough in principle to warrant application of the doctrine. *See, United States v. Walden*, 411 F.2d 1109, 1114 (4th Cir. 1969).

Maryland Rule 1230, effective November 2, 1970, adopts the Code of Professional Responsibility of the American Bar Association, *Lusby v. Nethken*, 262 Md. 584, 278 A.2d 552 (1971). The "Disciplinary Rules" contained

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[4] *See, e.g.*, Meltzer, *Required Records, the McCarran Act, and the Privilege against Self-Incrimination*, 18 U.Chi.L.Rev. 687 (1951): Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Colum.L.Rev. 681 (1965); McKay, *Self-Incrimination and the New Privacy*, 1967 Supreme Court Review 193.

[5] Shapiro continues to be cited with approval by the Supreme Court. *See, e.g., California v. Byers, supra.*

therein represent the mandatory minimum level of conduct required of members of the Bar. *Montgomery v. State*, 15 Md. App. 7, 288 A.2d 628 (1972). DR 9-102(B)(3) requires that every lawyer:

> "Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them."

Neither the Code of Professional Responsibility nor Maryland Code (1957, 1968 Repl. Vol., 1972 Cum. Supp.) Article 10 §44,[6] prohibiting an attorney from commingling client funds with his own monies, make provision for required reporting or periodic audit.[7] However, in the course

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6 "(a) If any attorney is entrusted with, or receives and accepts, or otherwise holds, deposit monies or other trust monies, of whatever kind or nature, such monies, in the absence of written instructions or court order to the contrary shall be expeditiously deposited in an account maintained as a separate account or accounts for funds belonging to others. In no event shall he commingle any such funds with his own or use any such funds for any purpose other than the purpose for which such funds were entrusted to him."

7 In an exhaustive "Report of the Special Committee on Evaluation of Disciplinary Enforcement," 95 Reports of the American Bar Association 783, 968-70 (1970), the ABA Committee officially recommended:

> "A court rule requiring (1) that all attorneys maintain the records pertaining to client funds required under the provisions of Disciplinary Rule 9-102(B)(3) for a reasonable period after final distribution of the funds has been made; and (2) that these records be audited annually."

(continued)

of regulating transactions involving conveyancing of real estate, the Legislature passed Article 21 §42, *supra*, note 1, providing a limited right of audit "of the accounts maintained by such person for funds received in connection with real estate closing transactions in this State." Thus, by combination of court rule and statute, the records in the instant case are required to be kept subject to audit in the narrow circumstances outlined in Article 21 §42.[8]

We think the ordered audit fits each of the *Shapiro* criteria enumerated above. First, the records required are, obviously, records customarily kept by lawyers, necessary to a proper accounting of monies held for others. Secondly, the records have "public aspects" making them at least analogous to public records. They detail the use of monies which the lawyer holds for others in an area properly regulated by the State. In *State Real Estate Commission v. Roberts, supra,* the Supreme Court of Pennsylvania recognized that the escrow account records of a real estate broker were required records within the meaning of *Shapiro.* Similarly, in *United States v. Silverman,* 449 F.2d 1341, 1345 (2d Cir. 1971), the court recognized that an

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[7] (continued)

Such a procedure has apparently been successful in England, *see* discussion in *Blackmon v. Hale,* 78 Cal. Rptr. 569, 580-82 (1969), *vacated on other grounds,* 83 Cal. Rptr. 569, 463 P.2d 418 (1970). *See also,* Note, 42 Notre Dame Lawyer 382 (1966-67).

[8] We need not reach the issue of whether either the statute or the rule, standing alone (*e.g.,* a non-lawyer disbursing funds under §42 or a lawyer's use of client funds other than in the circumstances outlined in §42) would warrant application of the required records doctrine, for, under the facts of this case, both were in effect on and after November 2, 1970, a time period during which the non-compliance with Article 21 §42 was alleged and proved.

attorney's closing statements in contingent fee cases, required by court rule to be filed with the court, were required records, noting:

> "Appellant's fifth amendment argument is equally without merit. Records required to be kept pursuant to a reasonable regulatory scheme have 'public aspects' and may be examined for evidence of criminal conduct."

Thirdly, the records are not required of an "inherently suspect class" in an area permeated with criminal violations as in *Marchetti* and *Grosso, supra.* The distinction is clearly drawn by Justice Brennan's concurring opinion in *Mackey v. United States,* 401 U.S. 667, 708-09, 91 S.Ct. 1160, 1168, 28 L.Ed.2d 404, 430 (1971):

> "Of course, the Government may not insulate inquiries designed to produce incriminating information merely by labeling the inquiry a necessary incident of a regulatory scheme. Where the essence of a statutory scheme is to forbid a given class of activities, it may not be enforced by requiring individuals to report their violations. See *Marchetti,* . . . [390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889]; *Haynes v. United States,* 390 U.S. 85, 88, S.Ct. 722, 19 L.Ed.2d 923 (1968); *Albertson v. SACB,* 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed. 2d 165 (1968). *But where the statutory scheme is not designed to forbid certain acts, but only to require that they be done in a certain way, the Government may enforce its requirements by a compulsory scheme of reporting, directed at all who engage in those*

> *activities, and not on its face designed simply to elicit incriminating information. Shapiro v. United States,* . . . [335 U.S. 1, 68 S.Ct.1375, 92 L.Ed. 1787 (1948)]; see, *Albertson v. SACB, supra,* at 77-80, 15 L.Ed.2d at 170-172." (emphasis added.)

Article 21 §42 clearly evinces a legislative concern that mortgages and deeds of trust be released, and the buyer and seller informed, in accordance with the provisions of §42(a) and (b). Failure to follow the legislatively mandated procedure may subject the offending party to the audit contemplated by §42(c). But persons failing to adhere to the dictates of §42(a) and (b) are not "inherently suspect of criminal activity"; they need only show, or allow the audit to show, that another proper method was employed, *e.g.*, disbursement of funds within five days as provided in Article 21, §42(e).

We are not unmindful of the important values embodied in the Fifth Amendment, nor of its protection to lawyers, as "first class citizens." *Spevack v. Klein, supra.* Rather, we attempt the "blancing [of] the public need on the one hand, and the individual claim to constitutional protection on the other," suggested in *California v. Byers, supra,* and find that application of the required records doctrine, in the instant case, meets the balance called for without doing violence to the rights of either.

In the circumstances of this case, we conclude that Andresen's constitutional right against compulsory self-incrimination would not be violated by causing his real estate accounts to be subject to audit under §42(c). The lower court's order should, however, be modified to limit the audit to those "accounts maintained . . . for funds received

in connection with real estate closing transactions in this State" occurring on or after November 2, 1970, the effective date of Maryland Rule 1230. We are further of the view that the lower court's order should be modified to limit the audit, in its initial phase, to real estate conveyances involving the Potomac Woods Subdivision. In so concluding, we recognize that the scope of the audit authorized by the statute is not limited to those real estate transactions covered in the petition for audit. We, nevertheless, think it the more prudent course of action to first obtain the audit on the transactions occurring within the Subdivision and thereafter, if the Court deems it warranted, to pass a further order widening the audit to include other real estate transactions within the State in which Andresen acted as settlement attorney.

ORDER OF DECEMBER 19, 1972, MODIFIED IN ACCORDANCE WITH THE VIEWS EXPRESSED IN THIS OPINION AND AS MODIFIED AFFIRMED; COSTS TO BE PAID BY APPELLANT.

JAMES H. NORRIS, JR.
CLERK

Court of Appeals
of Maryland

Annapolis, Md. 21404

TELEPHONE 267-8341

JOSEPH L. DiSALA
CHIEF DEPUTY

OLIVE JANE RICHARDS
VIRGINIA STEHLE HUBBARD
MARY J. MORRIS
DEPUTIES

July 20, 1973

Peter C. Andresen, Esq.
Attorney at Law
3514 Plyers Mill Road
Kensington, Maryland 20795

Re: Peter C. Andresen v. Bar Association of
Montgomery County, Maryland
No. 336 - September Term, 1972

Dear Mr. Andresen:

The Court has considered the motion for reargument and modification of opinion and the motion to stay issuance of mandate, etc. filed on July 9, 1973, the opposition to the motion to stay issuance of mandate filed on July 16 and the rebuttal to appellee's opposition to motion to stay filed on July 18 in the above entitled case and has denied the motions on July 19, 1973.

A copy of the mandate is enclosed.

The record is being returned to the Circuit Court for Montgomery County.

Very truly yours,

James H. Norris, Jr.
Clerk

JHNjr/h
Encl.
cc: David B. Lamb, Esq.
James T. Wharton, Esq.

MANDATE

Court of Appeals of Maryland

No. 336 , September Term, 1972

Peter C. Andresen

v.

Bar Association of Montgomery County, Maryland

Appeal from the Circuit Court for Montgomery County.
Filed: February 16, 1973.
February 26, 1973: Motion to dismiss appeal filed.
March 5, 1973: Answer to above motion filed.
March 12, 1973: Motion to dismiss denied without prejudice etc.
March 16, 1973: Motion of appellee for leave to file typewritten briefs and to advance for argument filed.
March 16, 1973: Motion granted as to both parties. Case set during May session
April 30, 1973: Notice of appellant's intention to rely on Rule 830 (d) 1 and 830 (e).
June 12, 1973: Order of December 19, 1972, modified in accordance with the views expressed in this opinion and as modified affirmed; costs to be paid by appellant. Opinion by Murphy, C.J.
July 9, 1973: Motion for reargument and modification of opinion filed.
July 9, 1973: Motion to stay issuance of mandate pending review by Supreme Court of United States filed. (Over)

STATEMENT OF COSTS:

In Circuit Court:

Record	$ 15.00
Stenographer's Costs	118.80

In Court of Appeals:

Filing Record on Appeal	$ 20.00
Printing Brief for Appellant	36.24
Reply Brief	10.40
Portion of Record Extract — Appellant	42.60
Appearance Fee — Appellant	10.00
Motion for Reargument	5.00
Printing Brief for Appellee	53.25
Portion of Record Extract — Appellee	
Appearance Fee — Appellee	10.00

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this

day of *A. D. 19*

James H. Norris, Jr.

Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

July 16, 1973: Opposition to motion to stay issuance of mandate filed.
July 18, 1973: Rebuttal to appellee's opposition to motion to stay filed.
July 19, 1973: Motions for reargument, etc. and stay of mandate etc. denied.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 2, 1973

Peter C. Andresen, Esquire
3514 Plyers Mill Road
Kensington, Maryland 20795

RE: Peter C. Andresen v. Bar Association of Montgomery County, Maryland, A-122

Dear Mr. Andresen:

Your application for stay of mandate in the above-entitled case was presented to Mr. Justice Douglas, who has endorsed thereon the following:

"Application for stay denied.

W. O. D.

7/27/73"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson

FJL:lab

Francis J. Lorson
Assistant Clerk

cc: James T. Wharton, Esquire
100 South Washington Street
Rockville, Maryland 20850

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 20, 1973

Peter C. Andresen, Esquire
3514 Plyers Mill Road
Kensington, Maryland 20795

RE: Peter C. Andresen v. Bar Association
of Montgomery County, Maryland, A-122

Dear Mr. Andresen:

In Mr. Justice Marshall's absence, your application for stay of mandate in the above-entitled case was presented to Mr. Justice Powell, who has endorsed thereon the following:

"Denied

8/18/73

Lewis F. Powell, Jr."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

James H. Blondell
Assistant Clerk

lab

cc: James T. Wharton, Esquire
100 South Washington Street
Rockville, Maryland 20850

ARTICLE 21, SECTION 42, ANNOTATED CODE OF MARYLAND, (1966 Replacement Volume, as amended).

§42. Furnishing evidence of recorded release of mortgage or deed of trust.

(a) *Duty of person responsible for disbursement of funds in real estate conveyance.* –

When a person has undertaken responsibility for the disbursement of funds in connection with the conveyance of title to real property, it shall be the duty of such person to furnish to the seller and buyer in the transaction, the original or a photographic, photostatic or similarly reproduced copy of the recorded release of any mortgage or deed of trust which such person was obliged to obtain and record with all or part of the funds to be disbursed or, if such original or copy of a recorded release is not readily obtainable at the time of recording, it shall be sufficient to furnish the buyer or seller the original or a copy of the court's recordation receipt for such release or other certified court document clearly evidencing the recordation of such release.

(b) *Time of delivery of evidence.* –

The required evidence of a recorded release shall be mailed or otherwise delivered to the seller and buyer within thirty days from the delivery of the deed or deeds conveying title to the real property, except that if the recording of the release will be delayed beyond the thirty-day period for causes not attributable to the neglect, omission or malfeasance of the person responsible for the disbursement of funds, a letter explaining the delay shall be mailed or otherwise delivered to the seller and buyer within the

thirty-day period, and such person shall furnish to the seller and buyer the required evidence of the recorded release at the earliest opportunity thereafter, provided that the person shall follow the procedure of mailing or otherwise delivering a letter of explanation each thirty days until the required evidence of a recorded release is furnished to the buyer and seller.

(c) *Noncompliance with subsections (a) and (b).* –

If the provisions of subsections (a) and (b) are not complied with by the person responsible for the disbursement of funds, the seller, buyer, or a duly organized bar association of this State, may petition a court of equity to order an audit to be made of the accounts maintained by such person for funds received in connection with real estate closing transactions in this State. The petition shall state concisely the facts showing such noncompliance and shall be verified. The court shall upon receipt of such petition issue an order to the person to show cause within ten days why such audit should not be conducted. If such cause is not shown, the court may order the audit to be conducted. The court may order such other relief as it deems appropriate under the circumstances of the case.

(d) *Seller and buyer to be informed of provisions of section.* –

Prior to the execution of the deed or deeds conveying title to the real property, the person responsible for the disbursement of funds shall inform the seller and buyer in writing of the provisions of this section.

(e) *Effect of proper disbursement of funds within the five days.* –

Unless specifically requested to do so by either the buyer or the seller, a person responsible for the disbursement of funds in a real estate closing transaction shall not be required to provide such buyer or seller with the required evidence of a recorded release if such person properly disburses all funds entrusted to him in the course of the closing transaction within five (5) days from the date of the delivery of the deed or deeds conveying title to the real property.

(f) *Payment of cost of reproducing and mailing release.*–

The cost of reproducing and mailing a recorded release under this section shall be borne by the seller unless the parties otherwise agree.

(g) *"Person" defined.* – The word "person" as used in this section means any individual, partnership, firm, organization, corporation, trust entity, or similar institution. (1968, ch. 726).

MARYLAND RULES OF PROCEDURE, Rule 1230

The Code of Professional Responsibility of the American Bar Association, as set forth in Appendix F of the Maryland Rules, is hereby adopted. (Added Oct. 13, 1970)

Disciplinary Rule 9-102 Code of Professional Responsibility

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited

in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.